

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

TRISHA L. MUNDY )  
 )  
v. ) No. 3:04-0609  
 ) Judge Trauger/Brown  
CITY OF KNOXVILLE, TENNESSEE, )  
et al. )

RHONDA MUSICE )  
 )  
v. ) No. 3:04-0610 ✓  
 ) Judge Trauger/Brown  
CITY OF KNOXVILLE, TENNESSEE, )  
et al. )

To: The Honorable Aleta A. Trauger, District Judge

REPORT AND RECOMMENDATION

These two cases have been referred to the undersigned for case management (Docket Entry Nos. 36 (3:04-0609) and 42 (3:04-0610)), and specifically for report and recommendation on the following motions filed in both cases:

- Motion to Dismiss filed by defendant Blake Barham (Docket Entry No. 9);
- Motion to Dismiss filed by defendants City of Knoxville and Phil E. Keith (Docket Entry No. 11); and
- Motion to Dismiss filed by defendant Woodrow Gwinn (Docket Entry No. 18). (Docket Entry Nos. 35 (3:04-0609) and 33 (3:04-0610)).

For the reasons stated below, the Magistrate Judge recommends

that all motions to dismiss by governmental defendants (Docket Entry Nos. 9, 11, 51 (3:04-0609) and 9, 11, 54 (3:04-0610)) be GRANTED; that all other pending motions (Docket Entry Nos. 18, 42 (3:04-0609) and 43, 47, 56 (3:04-0610)) be terminated as MOOT, that the federal claims asserted in these cases be DISMISSED with prejudice, and that the state law claims asserted in these cases be DISMISSED without prejudice to being re-filed in state court.

### I. INTRODUCTION

For purposes of the pending motions to dismiss, the facts giving rise to these lawsuits are contained in the factual allegations of the amended complaint (Docket Entry Nos. 39 (3:04-0609) and 36 (3:04-0610)), which are taken as true.<sup>1</sup> The following is a summary of those allegations.

On July 8, 2003, defendant Woodrow Gwinn allowed his son, Barry Gwinn, who he knew to have an extensive drug problem, to use his Mercedes Benz automobile. Subsequently, defendant Fallon L. Tallent rented this automobile from Barry Gwinn for fifty dollars worth of cocaine. Docket Entry No. 1, ¶¶ 12-14.

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<sup>1</sup>In analyzing a motion to dismiss for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6), "[t]he court must construe the complaint in a light most favorable to the plaintiff, and accept all of her factual allegations as true. When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. Dismissal pursuant to a Rule 12(b)(6) motion is proper 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Bloch v. Ribar, 156 F.3d 673, 677 (6<sup>th</sup> Cir. 1998) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

Defendant Tallent has an established record of criminal offenses, and was under the influence of illegal narcotics at the time she drove away in the automobile. She subsequently drove the vehicle in Knoxville, Tennessee, picking up Dorothy Cash as a passenger along the way. On the morning of July 9, 2003, defendant Tallent drove the vehicle into the Walter P. Taylor Homes housing project in Knoxville. Defendant Blake Barham, a Knoxville Police Officer, pulled his police cruiser behind the vehicle driven by defendant Tallent and recognized it as a stolen vehicle. Id. at ¶¶ 15-18.

Defendant Barham began to exit his cruiser to investigate when defendant Tallent rammed the police cruiser with the vehicle she was driving, and sped away. Defendant Barham pursued defendant Tallent at high rates of speed in the city of Knoxville. Defendant Barham and the Knoxville Police Department were aware that the driver of the reportedly stolen Mercedes Benz automobile was defendant Tallent, whose personal and criminal history was well known to defendant Barham and other members of the police department. Training videos commonly used by the Knoxville Police Department depicted previous police encounters with defendant Tallent, including footage in one particular training video of defendant Tallent threatening the lives of officers and citizens with a firearm in an effort to elude the police. Id. at ¶¶ 19-22.

Defendant Barham, pursuant to Knoxville Police Department policy, terminated the pursuit of defendant Tallent at the intersection of Martin Luther King Boulevard and Castle Street in Knoxville, which is at or near an entrance ramp to Interstate 40. Defendant Barham knew or should have known that defendant Tallent entered the Interstate, but did not pursue her further. Id. at ¶ 23. Despite knowing that defendant Tallent had a history of threatening the lives of law enforcement officers in order to avoid capture, neither defendant Barham nor the Knoxville Police Department notified by any means of communication the Tennessee Highway Patrol or any other law enforcement agency of defendant Tallent's actions or whereabouts. Id. at ¶ 24. This failure to apprise other agencies of the approach and dangerous tendencies of defendant Tallent was consistent with the policy of the Knoxville Police Department. Id. at ¶ 25.

Defendant Barham and the Knoxville Police Department knew or should have known that any other police officer was in particular danger if they attempted to detain defendant Tallent. Nonetheless, no report of defendant Tallent's reckless driving was made to any other law enforcement agency until Mr. Jerry Cater, a truck driver traveling west on Interstate 40 in Cumberland County, Tennessee, called 911 to report a silver Mercedes Benz traveling westbound at over 100 miles per hour.

Id. at ¶ 27. Law enforcement personnel in Putnam County and Smith County, Tennessee did not receive this information in time to locate defendant Tallent, but the Mercedes Benz was spotted by Deputy Buhler of the Wilson County Sheriff's Department, and pursuit was initiated thereafter by Wilson County Sheriff's Deputies and Lebanon Police Officers. These officers were able to maintain pursuit of defendant Tallent in Wilson County, Tennessee. None of the pursuing officers knew that the driver of the vehicle had the propensity for violence toward police officers. Id. at ¶¶ 28-31.

On July 9, 2003 at 9:32 a.m., Mt. Juliet Police Dispatcher Jennifer Hamblen received a call from Lebanon Police, passing on information from the Tennessee Highway Patrol that a stolen gray Mercedes was traveling at high speed westbound on Interstate 40. Wilson County authorities had confirmed through a "be on the lookout" report, commonly known as a "BOLO", that the vehicle was stolen. However, the BOLO did not include the information that the driver had assaulted a Knoxville Police Officer with the automobile. Dispatcher Hamblen provided the information she possessed to Mt. Juliet Police Sergeant Jerry Mundy at 9:32 a.m., and Sergeant Mundy advised that he would utilize the Federal Signal Corporation Spike Strip, also known as the "Stinger", in the lanes of Interstate 40 to disable the vehicle driven by defendant Tallent. Mt. Juliet Police Deputy

John Musice was dispatched to assist Sergeant Mundy. Id. at ¶¶ 32-36.

Deputy Buhler continued to follow defendant Tallent, who was within his view as she approached the Mt. Juliet exit of Interstate 40, where plaintiffs Musice and Mundy were in wait of defendant Tallent. Plaintiff Mundy deployed the Stinger as defendant Tallent approached, while plaintiff Musice used his vehicle to prevent innocent citizens from entering the Interstate in the direction defendant Tallent was traveling. Id. at ¶¶ 37-38.

Defendant Tallent saw the deployed Stinger and intentionally drove into the bodies of plaintiffs Mundy and Musice. She could have swerved away from the officers and the patrol car in an effort to avoid the Stinger, but instead looked at her passenger Dorothy Cash and said "watch this" as she drove over the officers without ever hitting her brakes. Plaintiffs Mundy and Musice were killed upon impact. Id. at ¶¶ 39-41.

Upon these factual allegations, and pursuant to 42 U.S.C. §§ 1983 and 1988, plaintiffs make claims for monetary damages under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution, the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 et seq., and under the common and statutory laws of the state of Tennessee for wrongful death, breach of duties, outrageous conduct, intentional infliction of

emotional distress, negligent infliction of emotional distress, and negligent entrustment.

## II. DISCUSSION

### A. Federal Constitutional Claims

Defendants Blake Barham, Phil E. Keith, and Chris Baldwin (in a motion recently filed (Docket Entry Nos. 51 (3:04-0609) and 54 (3:04-0610))) move for dismissal of the federal claims against them in their individual capacities on the basis of qualified immunity.

Qualified immunity is a purely legal issue that must be decided at the earliest possible stage of the proceedings. Saucier v. Katz, 533 U.S. 194, 200-01 (2001). Under this doctrine, "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "It is not necessary that the very action have been previously held unlawful but, given the preexisting law, the unlawfulness of the conduct must have been apparent." Barton v. Norrod, 106 F.3d 1289, 1293 (6<sup>th</sup> Cir. 1997), cert. denied, 522 U.S. 934 (1997); see, e.g., Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly

incompetent or those who knowingly violate the law").

The threshold inquiry in determining whether a plaintiff's allegations are sufficient to defeat a defendant's motion based upon qualified immunity is whether the "plaintiff has asserted a violation of a constitutional right at all."

Siegert v. Gilley, 500 U.S. 226, 232 (1991); see also Williams v. Mehra, 186 F.3d 685, 691 (6<sup>th</sup> Cir. 1999). In other words, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier, 533 U.S. at 201. If that question is answered in the affirmative, then the Court must determine whether the right was clearly established. Id. If that question is answered in the negative, qualified immunity attaches and, concomitantly, the injured party fails to state a claim under 42 U.S.C. § 1983. AirTrans, Inc. v. Mead, 389 F.3d 594, 598, 600 (6<sup>th</sup> Cir. 2004).

Here, the undersigned must conclude that the plaintiffs' amended complaint under 42 U.S.C. § 1983 simply does not allege a violation of a constitutional right. Despite defendants' argument on this point and their assertion that it is plaintiffs' burden to prove the violation of a constitutional right, plaintiff Mundy failed to even address the issue in her responses to the motions to dismiss (Docket Entry Nos. 24 and 26 (3:04-0609)), but solely argued the viability of her state law

claims. Thus, it appears that plaintiff Mundy has effectively conceded her federal claims. Plaintiff Musice did respond to the qualified immunity argument, not by clarifying the constitutional violation upon which her complaint is based, but by arguing that the "subjective component" of the qualified immunity analysis defeats defendant's motion, citing Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). Docket Entry No. 26, pp. 2-4 (3:04-0610). However, the language from Harlow quoted in plaintiff's brief in fact describes an analysis that was explicitly abandoned in the remaining text of the case. As reflected in the language following the excerpted quote in plaintiff's brief, Harlow makes clear that the subjective good faith of the state actor is not an issue for consideration in the qualified immunity analysis, the limits of which were recast "essentially in objective terms[.]" Id. at 819. In short, plaintiffs' briefs have been most unhelpful in determining which constitutional right has allegedly been violated.

The amended complaints in both cases cite the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution (Docket Entry Nos. 39, ¶¶ 1, 42(a) (3:04-0609) and 36, ¶¶ 1, 43(a) (3:04-0610)), and further allege "[t]hat the collective actions of the Defendants violated the following clearly established and well settled federal constitutional rights to life, and the freedom from deprivation of liberty without due process of law." Id. at

¶ 43 (3:04-0609) and ¶ 44 (3:04-0610). The undersigned concludes that the facts of these matters do not support a claim under the Fourth Amendment, which is explicitly limited to searches and seizures,<sup>2</sup> neither of which transpired here. Likewise, the Fifth Amendment does not appear to provide any protection that may have been denied by these defendants under the facts as alleged.

In the absence of any arguable violation of a specific constitutional provision contained in the Bill of Rights, the constitutional rights to life and liberty may be vindicated under the rubric of substantive due process. County of Sacramento v. Lewis, 523 U.S. 833, 842-44 (1998) (citing Pleasant v. Zamieski, 895 F.2d 272, 276, n.2 (6<sup>th</sup> Cir.) (noting that fourteenth amendment substantive due process analysis is preserved "for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investigatory stop or other seizure"), cert. denied, 498 U.S. 851 (1990)). The substantive component of the Fourteenth Amendment's Due Process Clause protects against arbitrary action of government officials, though "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" Id. at 846 (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)). "Thus, in

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<sup>2</sup>Nor does a failed attempt to make a seizure implicate the Fourth Amendment. County of Sacramento v. Lewis, 523 U.S. 833, 843-45 & n.7 (1998) (citing California v. Hodari D., 499 U.S. 621, 626 (1991)).

a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Id. at 847 n.8.

In Lewis, the U.S. Supreme Court considered the high speed pursuit of an individual by a police officer, resulting in the death of the fleeing individual, where the officer was alleged to have acted with deliberate indifference or reckless disregard toward the life of the decedent. The Court noted that "[a] police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders." Id. at 853. Analogizing to the decisions that must be made in the context of a prison riot and the higher standard of fault that must be met to impose official liability in those exigent circumstances, as opposed to other claims of cruel and unusual punishment in the prison setting where deliberate indifference is the standard of culpability, the Court held as follows:

*Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.*

Id. at 854 (emphasis in original). The Court concluded that "[r]egardless whether [the officer's] behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983." Id. at 855.

There is no allegation in this case that the defendant officials acted or failed to act with the intent to cause the deaths of Officers Mundy and Musice, or of other law enforcement officers. However, it must be noted that the Court in Lewis limited its holding to the context of high-speed chases and the exigency of that setting, as the analogy to Eighth Amendment analysis makes clear, emphasizing that the deliberate indifference standard or other standards of culpability greater than mere negligence but lesser than intentional conduct may be appropriate in a factual setting where there is in fact time to deliberate. Id. at 849-854. The Court's holding is also necessarily limited by the predicate facts with which it was presented, namely the scenario in which the plaintiff is harmed during or as an immediate result of the pursuit. Thus, while the defendants' decisions with regard to initiating and terminating the pursuit of defendant Tallent must have been made with the intent to cause the harm alleged in order to be actionable under the Fourteenth Amendment, id. at 853, it would appear that the

defendants' failure to warn surrounding law enforcement agencies of defendant Tallent's approach and violent tendencies toward law enforcement officers, at some point after termination of the pursuit, is not necessarily subject to that high standard of culpability under Lewis. But cf. Lewellen v. Metropolitan Gov't of Nashville and Davidson County, Tenn., 34 F.3d 345 (6<sup>th</sup> Cir. 1994) (upon allegation that defendant school board was deliberately indifferent to worker's safety on school construction project, requiring a showing that the state defendant engaged in conduct "intentionally designed to punish someone," intentionally inflicted injury, or "took some other governmental action that is 'arbitrary in the constitutional sense'" in order to state a substantive due process claim).<sup>3</sup>

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<sup>3</sup>The Lewellen court relied on the Supreme Court's decision on similar facts in the case of Collins v. City of Harker Heights, Tex., 503 U.S. 115 (1992). In Harker Heights, the Supreme Court was "not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment." Id. at 128. Finding "Petitioner's submission that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented ... [and] quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty," the Supreme Court also reiterated the limits of substantive due process:

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

Id. at 126-27 (quoting DeShaney, 489 U.S. at 195).

In any event, the harm alleged to have resulted from defendants' failures after the pursuit was terminated was indisputably inflicted by a private act of violence, i.e., defendant Tallent's assault on the officers standing in her way. While the Due Process Clause does protect individuals against the state's abridgment of their rights to life, liberty and property, "[e]xcept in very limited circumstances ... it does not create an obligation on the state to protect individuals from injury to life, liberty or property caused by the acts of private parties, even though such injury might have been avoided by protective state actions." Foy v. City of Berea, 58 F.3d 227, 231 (6<sup>th</sup> Cir. 1995) (citing DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 196-97 (1989)). The first of the aforementioned "very limited circumstances," of which there are two, involves a failure to protect individuals in state custody; the second is known as the state-created danger exception, "under which state officials may be found to have violated the substantive due process rights of people not within their custody 'when their affirmative actions directly increase the vulnerability of citizens to danger or otherwise place citizens in harm's way.'" Cartwright v. City of Marine City, 336 F.3d 487, 493 (6<sup>th</sup> Cir. 2003) (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 509 (6<sup>th</sup> Cir. 2002)).

To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or

increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff.

Id. (citing Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6<sup>th</sup> Cir. 1998)).

It is just this cause of action which the amended complaints allege at paragraph 26:

. . . the Knoxville Police Department and its employees knew or should have known that any other police officer was in particular danger if they attempted to stop or arrest the Defendant Tallent. By this action, the Defendants, Knoxville Police Department and the City of Knoxville, created and increased the risk that an individual, particularly a police officer, would be exposed to a private act of violence by Defendant Tallent.

However, "failure to act is not an affirmative act under the state-created danger theory." Cartwright, 336 F.3d at 493 (citing Sargi v. Kent City Bd. of Educ., 70 F.3d 907, 912-13 (6<sup>th</sup> Cir. 1995)). Just as in Cartwright, plaintiffs here claim that it was defendants' failure to act that resulted in the increased risk facing any officers attempting to detain defendant Tallent. However, without an affirmative act, there can be no liability under the state-created danger exception.

Because plaintiff has not alleged any state action which can be said to be arbitrary in the constitutional sense, according to the authorities cited above, the undersigned

concludes that no substantive due process claim has been stated. In short, the undersigned concludes that the answer to the threshold question posed by the U.S. Supreme Court in Saucier -- "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" -- is no. Accordingly, the undersigned must conclude that the individual defendants are entitled to qualified immunity from plaintiffs' tort claims and, by extension, the City of Knoxville and Knoxville Police Department likewise can not be held liable under § 1983. Cartwright, 336 F.3d at 494; see City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (holding that in an action for damages, "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."). Without adequately alleging a constitutional violation, plaintiffs simply have not stated a claim under § 1983.

#### B. State Law Claims

In light of the foregoing, it is clear that plaintiffs' claims in these damages actions -- for breach of duties owed the decedents, negligent entrustment and handling of the instrument of their deaths, wrongful causation of their deaths, and the infliction of distress upon their survivors -- sound in state

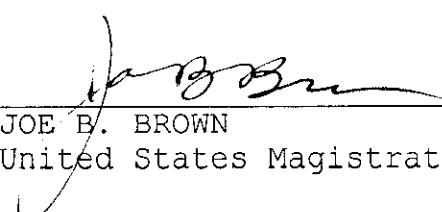
tort law, implicating both state statutory and common law liabilities and immunities for these governmental defendants. As reflected in the moving papers, with respect to the claims brought under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. §29-20-101 et seq., there is a split of authority among the district judges of this court and in this state as to whether the exclusive jurisdiction and venue provisions of that act divest the district court of its supplemental jurisdiction over such claims. Compare Beddingfield v. City of Pulaski, Tenn., 666 F.Supp. 1064 (M.D. Tenn. 1987) (Wiseman, J.), Timberlake v. Benton, 786 F.Supp. 676 (M.D. Tenn. 1992) (Nixon, J.), and Spurlock v. Whitley, 971 F.Supp. 1166 (M.D. Tenn. 1997) (Campbell, J.), with DePalma v. Metropolitan Gov't of Nashville and Davidson County, case no. 3:98-0333 (Echols, J.), and Malone v. Fayette County, Tenn., 86 F.Supp.2d 797 (W.D. Tenn. 2000). Rather than weigh in on this issue, the undersigned would submit that the dismissal of all federal claims from these lawsuits, the sufficiency of state law remedies to redress the harms alleged, and the nature of the claims and defenses asserted easily justify the decision to decline to exercise supplemental jurisdiction. See 28 U.S.C. § 1367(c). It is so recommended.

### III. RECOMMENDATION

In light of the foregoing, the Magistrate Judge recommends that all motions to dismiss by governmental defendants (Docket Entry Nos. 9, 11, 51 (3:04-0609) and 9, 11, 54 (3:04-0610)) be GRANTED; that all other pending motions (Docket Entry Nos. 18, 42 (3:04-0609) and 43, 47, 56 (3:04-0610)) be terminated as MOOT, that the federal claims asserted in these cases be DISMISSED with prejudice, and that the state law claims asserted in these cases be DISMISSED without prejudice to being re-filed in state court.

Any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to it with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. Thomas v. Arn, 474 U.S. 140 (1985); Cowherd v. Million, 380 F.3d 909, 912 (6<sup>th</sup> Cir. 2004) (en banc).

ENTERED this the 4 day of February, 2005.

  
JOE B. BROWN  
United States Magistrate Judge